

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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Case No. 4257-VCL



J. TRAVIS LASTER
VICE CHANCELLOR

New Castle County Courthouse
500 N. King Street, Suite 11400
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October 27, 2009

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RE: New Castle Shopping, LLC v. Penn Mart Discount Liquors, Ltd., *et al.*,
C.A. No. 4257-VCL

Dear Counsel:

Plaintiff New Castle Shopping, LLC ("New Castle Shopping") has moved for entry of a default judgment and for sanctions against the defendants. The gist of the motion is that defendants failed to agree to permit New Castle Shopping to amend its complaint and then failed to negotiate a schedule on which a motion to amend could be briefed. New Castle Shopping then obtained a teleconference with Vice Chancellor Parsons, to whom the matter was then assigned. Although there is as yet no transcript from the teleconference, I am told that Vice Chancellor Parsons understandably commented that there did not appear to be grounds to object to a proposed amendment, and that the defendants should appear and file any response to the motion for leave to amend by October 22, 2009. In its Motion for Default Judgment and For Sanctions, New Castle Shopping notes: "October 22, 2009 has come and gone. No responses to the Motion for Leave Amend have been filed."

The matter has since been assigned to me. I have reviewed the short letters submitted today in response to New Castle Shopping's motion. I have no desire to receive any further briefing. Nor do I require oral argument. I do require that the parties get serious and litigate this case.

I. THE MOTION TO AMEND.

Court of Chancery Rule 15(a) provides in pertinent part:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served Otherwise a party may amend the party's pleading only by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Motions to amend pleadings under Rule 15 are liberally granted. *Bowl-Mor Co. v. Brunswick Corp.*, 297 A.2d 61, 63 (Del. Ch. 1972); *see Am. Home Prods. Corp. v. Norden Labs., Inc.*, 1992 WL 368604, at *2 (Del. Ch. Dec. 11, 1992) (“‘Liberality of amendment to a pleading is a tradition in the courts of this State,’ and leave to amend generally is denied only when there is serious prejudice to the opposing party.”) (quoting *Bowl-Mor Co.*, 297 A.2d at 63); *Wolf v. Magness Constr. Co.*, 1996 WL 361502, at *1 (Del. Ch. June 11, 1996) (“In the absence of prejudice to another party, a trial court is required to exercise its discretion in favor of granting leave to amend.”). “Moreover, Delaware law has a strong preference for deciding cases on the merits, rather than on procedural grounds.” *Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 WL 3095952, at *5 (Del. Ch. Oct. 19, 2006). “Rule 15(a) is designed to implement the modern philosophy that cases are to be tried on their merits, not on the pleadings.” *Cartanza v. Lebeau*, 2006 WL 903541, at *2 (Del. Ch. Apr. 3, 2006).

In light of these well-settled principles, I prefer that parties stipulate to amendments to pleadings while reserving the right to challenge the sufficiency of the amended pleading at the time a response is due or through an appropriate motion. While it is not improper to oppose a motion to amend on substantive grounds, it is cumbersome, and I prefer that the pleading be filed and then addressed.

Here, the parties to the case should have stipulated promptly to the filing of the amended complaint. New Castle Shopping then could have filed its amended complaint, proceeded with service, and triggered responses under the rules in the ordinary course. Although it is unclear to me why this was not done, I will not delve into this side issue in this instance. I am ordering New Castle Shopping to file its amended complaint and proceed with service.

I am further ordering that to the extent that the defendants respond to the amended complaint by answering, they repeat in their answer the allegations of the complaint and then set forth their response below each allegation. Otherwise it becomes burdensome to

continually look back and forth from answer to complaint to see what is being admitted or denied.

II. THE MOTION FOR DEFAULT JUDGMENT.

Next up is the motion for default judgment. Rule 55(b) provides: “When a party against whom a judgment for affirmative relief is sought, has failed to appear, plead or otherwise defend as provided by these Rules, and that fact is made to appear, judgment by default may be entered” This rule gives the Court discretion to decide whether to enter a default judgment based on the particular set of facts presented. Entry of a default judgment is an “extreme remedy.” *U.S. Surgical Corp. v. Auhll*, 1998 WL 326493, at *2 (Del. Ch. May 28, 1998). A default judgment may be appropriate where there has been “a willful or conscious disregard for the rules of the Court.” *Id.* A default judgment also may be appropriate “when a party blatantly fails to appear or plead for a prolonged period of time.” *Greystone Digital Technology, Inc. v. Alvarez*, 2007 WL 2088859, at *2 (Del. Ch. July 20, 2007).

A motion for default judgment is not the appropriate vehicle for bringing order to this dispute. The situation here does not rise to a level where a default judgment is warranted. The motion is denied.

III. THE REQUEST FOR SANCTIONS.

Not content with asking for a default judgment, New Castle Shopping has requested sanctions. New Castle Shopping has not cited any comparable case and has chosen to ground its request for sanctions upon Rule 37, which applies to discovery disputes. I can only assume that because a default judgment is one of the range of possible remedies that can be awarded in the context of discovery misconduct, New Castle Shopping has chosen to cite Rule 37.

The short answer is that Rule 37 has no application to these facts. Stretching for Rule 37 should have been a clue to New Castle Shopping that its request for sanctions was not well founded.

Requesting sanctions is not something that should be done lightly. So tenuous is the basis for the request here that I have considered issuing a rule to show cause as to why some form of sanction should not be issued against New Castle Shopping for making the request. Had the defendants to incurred significant time and expense briefing New Castle Shopping’s motion, I likely would have taken that step. But I will not do so in this instance.

IV. THE PATH FORWARD.

On October 19, 2009, after this case was reassigned to me, I directed the parties to confer and submit a joint status report. As part of that order, I instructed the parties to submit their views as to how this case should proceed. In light of my rulings in this letter opinion, New Castle Shopping shall file and serve its amended complaint promptly. Once this has been done, New Castle Shopping will confer with the defendants and agree upon a single response date. I am extending the time for the filing of the joint status report until 10 days after the defendants' response date. In the status report, the parties will address meaningfully the activities and schedule necessary to prepare this case for resolution on the merits.

I am troubled by the lack of civility that appears to have marked this case. In this instance, I have chosen not to delve into the history of who did what, when, and to whom. Going forward, counsel will make a renewed effort to adhere to the Principles of Professionalism for Delaware Lawyers, with particular reference to Principle A.4, Civility:

Professional civility is conduct that shows respect not only for the courts and colleagues, but also for all people encountered in practice. Respect requires promptness in meeting appointments, consideration of the schedules and commitments of others, adherence to commitments whether made orally or in writing, promptness in returning telephone calls and responding to communications, and avoidance of verbal intemperance and personal attacks.

A lack of civility “may be detrimental to a client’s interests and contrary to the administration of justice.” *Id.* The parties should take these principles to heart.

Very truly yours,

/s/ J. Travis Laster

J. Travis Laster
Vice Chancellor

JTL/krw